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Appl. No. 09/821,376
Docket No. 8491
Amdt. dated March 19, 2007
Reply to Office Action mailed on December 21, 2006
Customer No. 27752

REMARKS / ARGUMENTS

Applicants thank the Examiner for the consideration given the present application. Claims 1-6, 8-11, 13-15, 17-18 and 20 are pending in the present application. No additional claims fee is believed to be due.

The Rejection under 35 U.S.C. § 103 (a)

The Examiner has rejected Claims 1-6, 8-11, 13-15, 17-18 and 20 under 35 U.S.C. § 103 (a) as being obvious in view of Product Alert (v. 28, n. 11) in view of Peroutka (US 2002/0122815). For the following reasons, Applicants respectfully traverse this rejection.

The Examiner's generalization that, because Product Alert reference arguably contains ingredients similar to the present invention, it is more than reasonable to assume that it also possesses similar Glycemic Index characteristics, does not meet the Examiner's burden of establishing a prima facie case of obviousness. To establish a prima facie case of obviousness under 35 U.S.C. § 103, the Examiner must meet three basic criteria. First, there must be some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify the reference or combine reference teachings. Second, there must be a reasonable expectation of success. Finally, the prior art reference (or references when combined) must teach or suggest *all* the claim limitations. See, for example, *In re Vaeck*, 947 F.2d 488 (Fed. Cir. 1991). Applicants respectfully assert that the Office Action fails to establish the first and third criteria, and thus, fails to make a prima facie case of obviousness under 35 U.S.C. § 103.

First, Applicants respectfully assert that there is no suggestion or motivation, either in the Product Alert reference itself or in the knowledge generally available to one of ordinary skill in the art, to modify the reference or combine reference teachings. The mere fact that references can be combined or modified does not render the resultant combination obvious unless the prior art also suggests the desirability of the combination. See *In re Mills*, 916 F.2d 680 (Fed. Cir. 1990). Applicants respectfully assert that there is nothing in the Product Alert reference that suggests the desirability of modifying the reference to produce the compositions of the present invention. Indeed, the Product Alert reference fails to even discuss low Glycemic Index value compositions, produced by limiting the amount of total fructose in the composition, much less disclose the aforementioned surprising benefit associated therewith. Therefore, Applicants respectfully submit that the Product Alert reference does not suggest the desirability of the present composition, such that it would motivate one skilled in the art to modify the cited reference.

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Second, the Product Alert reference, does not teach or suggest *all* of the claim limitations of the present invention, which teaches compositions for use as foods or beverages, comprising one or more flavanols, one or more bracers, and vitamin B, wherein the composition exhibits a Glycemic Index of about 55 or less, and wherein the composition comprises from about 0.1% to about 10% of the total fructose, by weight of the composition. It is this particular combination that has surprisingly been found to produce compositions having a low Glycemic Index value that enhances the perceived positive mood and energy in the consumer, without rapid depletions of blood glucose, while reducing the insulin response. In contrast, the Product Alert reference fails to even teach a composition having a Glycemic Index of about 55 or less, much less disclose its relevance to the achievement of the surprising benefits.

Moreover, the Product Alert reference does not teach the particular amounts of the various ingredients required to produce the surprising benefits of the present invention. Specifically, the Product Alert reference fails to teach that, by combining the ingredients in the particular proportions indicated in the present claims, and limiting the total fructose in the composition, the perceived positive mood and energy in the consumer is enhanced without rapid depletions of blood glucose, while simultaneously reducing the insulin response. This surprising benefit can be attributed to the low Glycemic Index value exhibited by the present compositions, which results in part from the low total fructose content.

For example, in the present application, under the section entitled "Enhancement of Perceived Energy," the Applicants describe an analytical method wherein three compositions, including the composition described herein, are tested for their effects on individuals' perceived energy. The test results clearly indicate that the low Glycemic Index value compositions of the present invention provide and / or maintain mental alertness better relative to the high Glycemic Index value compositions tested. Moreover, Examples 1 and 2 of the present application further support the notion that compositions having a low Glycemic Index value provide the perception of enhanced energy and alertness relative to high Glycemic Index value products. Because the Product Alert reference fails to specifically limit the total fructose of the compositions therein, and because the total fructose influences the Glycemic Index value of the composition, the Glycemic Index value claimed herein cannot be said to be taught in the Product Alert references. Thus, the Product Alert reference cannot be said to teach *all* of the claim limitations of the present invention. Therefore, for both of these reasons, Applicants respectfully assert that the Product Alert reference does not teach all the claim limitations of the present invention.

With respect to Claim 1, Applicants respectfully submit that Peroutka does not teach or suggest *all* of the claim limitations of the present invention, which teaches compositions for use

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as foods or beverages, comprising one or more flavanols, one or more bracers, and vitamin B, wherein the composition exhibits a Glycemic Index of about 55 or less, and wherein the composition comprises from about 0.1% to about 10% of the total fructose, by weight of the composition. Because Peroutka fails to specifically limit the total fructose of the compositions therein to from about 0.1% to about 10% of the total fructose, and because the total fructose influences the Glycemic Index value of the composition, the Glycemic Index value claimed herein cannot be said to be taught in the Peroutka. Thus, Peroutka cannot be said to teach *all* of the claim limitations of the present invention. Therefore, for both of these reasons, Applicants respectfully assert that Peroutka does not teach all the claim limitations of the present invention.

With respect to Claim 1, Applicants respectfully submit that the combined disclosures of Product Alert and Peroutka would not lead the skilled artisan to a realization of Applicants' invention. Attention is directed to the fact that neither references teach or disclose all of the elements of Claim 1, as discussed above. Specifically, neither reference teaches that "the composition comprises from about 0.1% to about 10% of the total fructose." Accordingly, it is submitted that there is no motivation in either reference to combine the Appellants respectfully submit that the cited art does not suggest the desirability of the present composition, such that it would motivate one skilled in the art to modify the cited reference. Therefore, the present invention is not obvious over the cited art.

Thus, Applicants respectfully assert that the present invention is not obvious in view of the cited Product Alert and Peroutka references. The present invention is directed to food and beverage composition, which possess a Glycemic Index of about 55 or less and contain particular amounts of various components. This particular combination, along with the specified amounts of each component, is not disclosed in the Product Alert or Peroutka references, nor would the skilled artisan deduce this combination from the cited Product Alert and Peroutka references. Moreover, this unique combination has surprisingly been found to enhance the perceived positive mood and energy in the consumer, without rapid depletions of blood glucose, while reducing the insulin response, as illustrated in the Examples provided in the present application. Therefore, the present invention is not obvious in light of the cited references, and the rejection under 35 U.S.C. § 103 should be withdrawn.

CONCLUSION

For all the foregoing reasons, Applicants respectfully request withdrawal of the rejection under 35 U.S.C. § 103.

Respectfully submitted,

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